IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

In the matter of an Appeal in terms of Article 138 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

C.A. Case No: **CA (PHC) 37/2015**

H.C. Kurunegala Case No: **HCRA 149/2012**

M.C. Wariyapola Case No: **87256**

Officer-in-Charge,
Police Station,
Wariyapola.

Complainant

Vs.

R.M.S. Indika Rathnayaka,
No. 37, Horombuwa junction,
Ganewatta Road,
Wariyapola.

Accused

R.M.N. Anuradha Rathnayaka,
Hospital junction,
Wariyapola.

Aggrieved party (Claimant)

AND BETWEEN

R.M.N. Anuradha Rathnayaka,
Hospital junction,
Wariyapola.

Aggrieved party-Petitioner (Claimant)

Vs.

Officer-in-Charge,
Police Station,
Wariyapola.

Complainant-Respondent

The Attorney General,
Attorney General's Department,
Colombo 12.

2nd Respondent

R.M.S. Indika Rathnayaka,
No. 37, Horombuwa junction,
Ganewatta Road,
Wariyapola.

Accused-3rd Respondent

AND NOW BETWEEN

R.M.N. Anuradha Rathnayaka,
Hospital junction,
Wariyapola.

Aggrieved party Petitioner-Appellant (Claimant)

Vs.

Officer-in-Charge,
Police Station,
Wariyapola.

Complainant-1st Respondent-Respondent

The Attorney General,

Attorney General's Department,
Colombo 12.

2nd Respondent-Respondent

R.M.S. Indika Rathnayaka,
No. 37, Horombuwa junction,
Ganewatta Road,
Wariyapola.

Accused-3rd Respondent-Respondent

BEFORE	:	K. K. Wickremasinghe, J. Janak De Silva, J
COUNSEL	:	AAL Nihara Randeniya for the Aggrieved party-Petitioner-Appellant Nayomi Wickremasekara, SSC for the 2nd Respondent-Respondent
ARGUED ON	:	02.10.2018
WRITTEN SUBMISSIONS	:	The Aggrieved party Petitioner-Appellant – On 18.09.2018 The 2nd Respondent-Respondent – On 02.10.2018
DECIDED ON	:	13.11.2018

K.K.WICKREMASINGHE, J.

The Claimant-Petitioner-Appellant has filed this appeal seeking to set aside the order of the Learned High Court Judge of Kurunegala dated 06.02.2015 in Case

No. HCR 149/2012 and seeking to set aside the confiscation order made by the Learned Magistrate of Wariyapola dated 19.10.2012 in Case No. 87256.

Facts of the Case:

The accused-3rd respondent- respondent (hereinafter referred to as the 'accused') was charged in the Magistrate's Court of Wariyapola for illegally transporting timber in a vehicle bearing No. 57 - 0792 on or about 03.02.2012, an offence punishable under section 25(2) read with sections 30A, 40, 40A and 25(1) of the Forest Ordinance (as amended). The accused pleaded guilty to the charge on 27.04.2012. Accordingly the Learned Magistrate convicted him and imposed a fine of Rs.20, 000/- with a default term of 6 months simple imprisonment.

Thereafter a vehicle inquiry was held where the registered owner of the vehicle (hereinafter referred to as the 'appellant) had given evidence and the inquiry was concluded. The Learned Magistrate confiscated the said vehicle by order dated 19.10.2012 stating that the registered owner had the knowledge about the accused utilizing the vehicle for such illegal purpose.

Thereafter the appellant filed a revision application in the High Court of Kurunegala under case No. HCR 149/2012 which was dismissed by the Learned High Court Judge by the order dated 06.02.2015.

Being aggrieved by the said dismissal, the appellant preferred an appeal to this Court.

The Learned Counsel for the appellant has submitted following grounds of appeal;

a) The said judgment is contrary to law and against the weight of evidence,
b) The Learned High Court Judge had not properly appreciated and evaluated the precautionary measures taken by the aggrieved party petitioner-appellant,

c) The inference drawn by the Learned Magistrate in imputing the knowledge of the commission of the offence to the appellant has been incorrectly held as correct by the Learned High Court Judge.

The appellant in the vehicle inquiry had testified that there were no previous records of using this vehicle for illegal purposes by the accused and the behaviour of the accused was good until this incident. The appellant had further stated that the accused left the appellant's place on 02.02.2012 for a hire to the airport and he advised the accused to not to use the vehicle for any illegal purposes.

In the case of **Manawadu V. The Attorney General (1987) 2 SLR 30**, it was held that,

> *"By Section 7 of Act No. 13 of 1982 it was not intended to deprive an owner of his vehicle used by the offender in committing a 'forest offence' without his (owner's) knowledge and without his participation. The word 'forfeited' must be given the meaning 'liable to be forfeited' so as to avoid the injustice that would flow on the construction that forfeiture of the vehicle is automatic on the conviction of the accused The amended sub-section 40 does not exclude by necessary implication the rule of 'audi alteram partem' . The owner of the lorry not a party to the case is entitled to be heard on the question of forfeiture of the lorry, if he satisfies the court that the accused committed the offence without his knowledge or participation, his lorry will not be liable to forfeiture.*
>
> *The Magistrate must hear the owner of the lorry on the question of showing cause why the lorry is not liable to be forfeited. If the Magistrate is satisfied with the cause shown, he must restore the lorry to the owner. The Magistrate may consider the question of releasing the lorry to the owner pending*

inquiry, on his entering into a bond with sufficient security to abide by the order that may ultimately be binding on him"

In the case of **Faris V. The Officer in charge, Police Station, Galenbindunuwewa and another (1992) 1 S.L.R. 167,** it was held that,

"...an order for confiscation cannot be made if the owner establishes one of two matters. They are:

i. That he has taken all precautions to prevent the use of the vehicle for the commission of the offence;

ii. That the vehicle has been used for the commission of the offence without his knowledge.

In terms of the proviso, if the owner establishes any one of these matters on a balance of probability, an order for confiscation should not be made..."

We observe that the Learned Magistrate has considered the fact that the accused had informed Court on 13.06.2012 about the inability of the appellant to be present in Court and got the case re-fixed for inquiry. The Learned Magistrate had come to a conclusion that the evidence of the appellant was not trustworthy since he was maintaining a close relationship with the accused even if the appellant testified that he fired the accused.

In the case of **Orient Financial Services Corporation Ltd. V. Range Forest Officer of Ampara and another [SC Appeal No. 120/2011],** it was held that,

"The Supreme Court has consistently followed the case of Manawadu vs the Attorney General. Therefore it is settled law that before an order for forfeiture is made the owner should be given an opportunity to show cause. If the owner on balance of probability satisfies the court that he had taken

precautions to prevent the commission of the offence or the offence was committed without his knowledge nor he was privy to the commission of the offence then the vehicle has to be released to the owner."

In the case of **Mary Matilda Silva V. P.H. De Silva [CA (PHC) 86/97]**, it was held that.

"For these reasons I hold that giving mere instructions is not sufficient to discharge the said burden. She must establish that genuine instructions were in fact given and that she took every endeavor to implement the instructions... "

In light of above, it is our view that the burden is cast on the vehicle owner to prove to the satisfaction of Court that any such offence was committed without his knowledge and/or he had taken every possible step to prevent an offence being committed. The Learned Magistrate of Wariyapola has held as follows;

"...එදින ලියාපදිංචි අයිතිකරු නොපැමිණි බැවින් ඒ පිලිබඳව අධිකරණයට දන්වා දිනයක් ලබා ගැනීමට පැමිණ ඇත්තේ එසේ තම සේවයෙන් ඉවත් කළායයි කියන රියදුරුමය...ඒ අනුව මෙම නීති විරෝධී ක්‍රියා කිරීම නිසා චිත්තිකරුව සේවයෙන් ඉවත් කළායයි ලියාපදිංචි අයිතිකරු සාක්ෂි දී ප්‍රකාශ කර ඇතත් එය කිසිසේත් පිලිගත නොහැකිය..."

Addressing the contention of the Learned Counsel for the appellant in the High Court, the Learned High Court Judge has held that the Learned Magistrate was not acting upon a mere assumption but had considered the evidence on a balance of probabilities. Accordingly the Learned High Court in the order dated 06.02.2015 has held that,

"...ඔහුගේ සාක්ෂිය විශ්වාස කළ හැකි සාක්ෂියක්ද යන්න සම්බන්ධව නිගමනය කිරීමට මෙවැනි සිද්ධිමය කරුණු ඉලිබඳ වුවද උගත් මහේස්ත්‍රාත්වරයාගේ අවධානය යොමු කිරීමට නීතිමය බාධාවක් නිබී නැත..."

Therefore coming into a similar conclusion, we are of the view that the appellant's version of evidence where he stated that he had given instructions to the accused was not reliable since the credibility of said evidence was challenged. Therefore we agree with the findings of both the Learned Magistrate and the Learned High Court Judge.

In the case of **Bank of Ceylon V. Kaleel and others (2004) 1 Sri L R 284,** it was held that;

"In any event to exercise revisionary jurisdiction the order challenged must have occasioned a failure of justice and be manifestly erroneous which go beyond an error or defect or irregularity that an ordinary person would instantly react to it - the order complained of is of such a nature which would have shocked the conscience of court."

In the case of **Rasheed Ali V. Mohamed Ali (1981) 2 SLR 29** it was held that,

"The powers of revision conferred on the Court of Appeal are very wide and the Court has discretion to exercise them whether an appeal lies or not or whether an appeal had been taken or not. However this discretionary remedy can be invoked only where there are exceptional circumstances warranting the intervention of the court..."

In the case of **Dharmaratne and another V. Palm Paradise Cabanas Ltd. (2003) 3 SLR 24,** where it was held that,

"Existence of exceptional circumstances is the process by which the court selects the cases in respect of which the extraordinary method of

rectification should be adopted. If such a selection process is not there revisionary jurisdiction of this court will become a gateway of every litigant to make a second appeal in the garb of a Revision application or to make an appeal in situations where the legislature has not given a right of appeal..."

Therefore the revisionary powers of this Court shall not be exercised when there was no illegality, irregularity or failure of justice in aforesaid orders. Accordingly we see no reason to interfere with the order of the Learned High Court Judge of Kurunegala dated 06.02.2015 and the confiscation order made by the Learned Magistrate of Wariyapola dated 19.10.2012.

Accordingly the revision application is dismissed without costs.

JUDGE OF THE COURT OF APPEAL

Janak De Silva, J

I agree.

JUDGE OF THE COURT OF APPEAL

Cases referred to:

1. Manawadu V. The Attorney General (1937) 2 SLR 30
2. Faris V. The Officer in charge, Police Station, Galenbindunuwewa and another (1992) 1 S.L.R. 167
3. Orient Financial Services Corporation Ltd. V. Range Forest Officer of Ampara and another [SC Appeal No. 120/2011]
4. Mary Matilda Silva V. P.H. De Silva [CA (PHC) 86/97]
5. Bank of Ceylon V. Kaleel and others (2004) 1 Sri L R 284
6. Rasheed Ali V. Mohamed Ali (1981) 2 SLR 29
7. Dharmaratne and another V. Palm Paradise Cabanas Ltd. (2003) 3 SLR 24